Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, AND ORNAMENTAL IRON WORKERS, LOCAL UNION NUMBER 55, AND VAL HELLDOBLER,

Petitioners,

v.

WALCHER & FOX, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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80 pp

QUESTIONS PRESENTED

A non-profit corporation that administers employee benefit plans brought suit against an employer for unpaid employee benefit contributions pursuant to collective bargaining agreements entered into between the employer and a labor organization. The employer impleaded the labor organization and the labor organization's business representative alleging that they had fraudulently misrepresented the scope of the collective bargaining agreements and that they were therefore liable for contribution and indemnification for any monies owed by the employer to the non-profit corporation.

1.) Is there jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, over the employer's action against the labor organization alleging fraudulent misrepresentation?

2.) Is an employer's action against a labor organization for fraudulent misrepresentation of the terms of a collective bargaining agreement preempted by the primary jurisdiction of the National Labor Relations Board?

3.) Is an action by an Employer against a labor organization for fraudulent misrepresentation of the terms of a collective bargaining agreement preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185?

4.) Is a labor organization's business representative immune from suit by an employer for fraudulent misrepresentation of the terms of a collective bargaining agreement pursuant to Section 301(b) of the Labor Management Relations Act, 29 U.S.C. § 185?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners International Association of Bridge, Structural, and Ornamental Iron Workers, Local Union Number 55 and Val Helldobler.

Respondent

Walcher & Fox, Inc.

Other Parties

Northwestern Ohio Administrators, Inc.

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IN THE

Supreme Court of the United States

No. ___

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, AND ORNAMENTAL IRON WORKERS, LOCAL UNION NUMBER 55, AND VAL HELLDOBLER,

Petitioners,

v.

WALCHER & FOX, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners International Association of Bridge, Structural, and Ornamental Iron Workers, Local Union Number 55 (hereinafter referred to the "Union") and Val Helldobler (hereinafter referred to as "Helldobler") respectfully request that this Court issue a Writ of Certiorari to review the Judgement entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit on the merits is reported at 270 F. 3d 1018 (6th Cir. 2001), and is reproduced in App. A at 1a. The Opinion and Order of the United States District Court for the Northern

District of Ohio is unreported and is reproduced in App. B at 23a. The Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Ohio is unreported and is reproduced in App. C at 36a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was issued on November 6, 2001. This Court has jurisdiction under 28 U.S.C. § 1254 (a).

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 provides as follows:

> **Suits by and against labor organizations**
>
> **(a) Venue, amount, and citizenship**
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> **(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments**
>
> Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be

enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of questions of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

This case arises from a suit brought by Northwestern Ohio Administrators, Inc. (hereinafter referred to as "NOA") against Walcher & Fox, Inc. (hereinafter referred to as "WF").[1] In this regard, NOA brought suit against WF pursuant to the provisions of the Employee Retirement Income Security Act (hereinafter referred to as "ERISA"),

[1] NOA is a non-profit Corporation that administers a variety of employee benefit plans established by certain labor organizations and employers in the Northwest Ohio area.

29 U.S.C. Section 1001 *et seq.*, and Section 301 of the Labor Management Relations Act (hereinafter referred to as the "LMRA"), 29 U.S.C. Section 185. Specifically, NOA claimed that WF owed past due fringe benefit and pension fund contributions pursuant to certain project agreements entered in to by WF with the Union.

WF was at all pertinent times a construction subcontractor primarily engaged in the erection of pre-engineered steel buildings. The Union is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (hereinafter referred to as the "NLRA"), 29 U.S.C. Section 152(5). The Union represents employees engaged in the fabrication, production, erection, or construction of metal buildings in the Northwest Ohio area. Val Helldobler was a business representative for the Union.

In September of 1996, Helldobler approached WF at a construction site in Temperance, Michigan and on several occasions urging WF to sign a collective bargaining agreement with the Union. WF initially declined to sign such agreements. Helldobler persisted in his efforts and on or about September 18, 1996 obtained WF's agreement to enter into a collective bargaining agreement covering two (2) workers to be supplied by the Union. This initial agreement was to be limited to the Temperance, Michigan project. The Union and WF subsequently entered into four (4) additional project agreements between 1996 and 1997 which were virtually identical to the initial agreement.

Subsequently, in September of 1997, NOA demanded that WF submit to a payroll audit. WF refused, and NOA filed the aforementioned action in the United States District Court for the Northern District of Ohio, Western Division.

NOA filed a Motion for Partial Summary Judgment which was denied by the District Court. The Court found that the project agreements were ambiguous because handwritten

notations on some of the agreements indicated that the Union and WF may have intended said agreements to cover only the one or two workers represented by the Union.

WF then filed a Third Party Complaint against the Union and Helldobler under Section 301 of the LMRA, 29 U.S.C. Section 185 and under Ohio Law. *See*, App. D. In its Third Party Complaint, WF sought to allege claims for declaratory judgment, indemnification, contribution, fraud, and negligent misrepresentation in the event that WF became liable to NOA to make fringe benefit and pension contributions for individuals other then the one or two workers referred by the Union for each of the five (5) project agreements. The Union and Helldobler filed a Motion to Dismiss WF's Third Party Complaint against them.

The District Court then held a bench trial limited to the scope of the five (5) project agreements. The District Court held that, notwithstanding the handwritten notations on the project agreements, NOA was entitled to collect contributions for all of the Company's employees who worked under the project agreements regardless of whether or not the Union and WF intended to limit the benefits available under the project agreements to one or two workers supplied by the Union. *See*, App. C.

The District Court also denied the Union's and Helldobler's Motion to Dismiss. *See*, App. B. The District Court certified all issues for interlocutory review, which were accepted by the Court of Appeals.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision. *See*, App. A. In the first instance, the Court of Appeals affirmed the District Court's holding that the Third Party Complaint was not controlled by this Court's decision in *Textron Lycoming Reciprocating Engine Div. v. UAW*, 523 U.S. 653 (1998). Second, the Court of Appeals affirmed the District Court's

holding that the allegations set forth in the Third Party Complaint were not preempted by Federal Labor Law as set forth in *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959). Third, the United States Court of Appeals for the Sixth Circuit upheld the District Court's decision that the Third Party Complaint was not preempted by the provision of Section 301 of the LMRA, 29 U.S.C. Section 185. Finally, the Court of Appeals also affirmed the District Court's decision that Petitioner Helldobler was not immune from suit as an individual pursuant to the provisions of Section 301(b) of the LMRA, 29 U.S.C. Section 185(b).

For the reasons which follow, Petitioners respectfully submit that the United States Court of Appeals' decision, affirming the erroneous decision of the United States District Court for the Northern District of Ohio, is contrary to existing precedent of this Court and is in conflict with the decisions of other United States Courts of Appeals.

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS IN DIRECT CONFLICT WITH RELEVANT PRECEDENT ESTABLISHED BY THIS COURT AND IN CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

A. The Sixth Circuit's Opinion is in direct conflict with this Court's decision in *Textron*.

In *Textron Lycoming Reciprocating Engine Div. v. UAW*, 523 U.S. 653 (1998), this Court made clear that there exists no jurisdiction under Section 301 of the LMRA, 29 U.S.C. Section 185 where the party bringing suit has not alleged a violation of a collective bargaining agreement. In *Textron*, a Union brought suit against an employer who was a party to a collective bargaining agreement with it alleging that the

employer had fraudulently induced the Union to sign a collective bargaining agreement. *See*, *Textron Lycoming v. UAW*, 523 U.S. 653, 655 (1998). At no time did the complaining party in *Textron* allege the existence of a breach of the collective bargaining agreement.

The Third Party Complaint in the instance case specifically invoked the District Court's jurisdiction under Section 301 of the LMRA, 29 U.S.C. Section 185 and under the District Court's supplemental jurisdiction. It is virtually identical to the complaint which was at issue in *Textron*, in that WF alleges that the Union and Helldobler fraudulently misrepresented the effect of signing the project agreements at issue herein and thereby fraudulently induced WF to enter into said agreements. While the Court of Appeals, as well as the District Court, appear to intimate that the claims set forth in the Third Party Complaint are not actionable under Section 301 of the LMRA, the Court of Appeals never dismissed the Third Party Complaints claims arising under Section 301. Instead, the Court of Appeals appears to have found that the claims set forth in the Third Party Complaint were claims arising under state law and that the District Court consequently had supplemental jurisdiction over said claims. Nevertheless, the Court of Appeals allowed the Section 301 claim to stand.

Furthermore, and as will be further elaborated on below, what the Court of Appeals did in the instant matter was allow WF to recast a Section 301 claim, virtually identical to the one in *Textron*, as a state law claim. Clearly, the Sixth Circuit's Opinion is in direct and clear conflict with this Court's decision in *Textron* and therefore, Certiorari is appropriate.

B. The Sixth Circuit's Opinion is in direct conflict with this Court's decisions in *Garmon* and its progeny.

If the Court of Appeals was correct that the allegations set forth in the Third Party Complaint were merely state law claims properly within the District Court's supplemental jurisdiction, then the Court of Appeals' Opinion affirming the District Court is in clear conflict with the doctrine set forth in *San Diego Building Trades vs. Garmon*, 359 U.S. 236 (1959) and its progeny.

This Court has long found efforts to bypass the statutory mechanism created by Congress in the National Labor Relations Act to be preempted. *See, e.g. Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955). In *Garmon*, this Court not only reemphasized this preemption doctrine, but furthermore, established a test to be applied in determining whether or not an action should be considered preempted. Specifically, this Court held that "[w]hen an activity is arguably subject to Section 7 or Section 8 of the Act of the [NLRA], the State as well as the Federal Courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be adverted." *See, San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-245 (1959).

Significantly, this Court held that even if it was not clear whether a labor organization's conduct was protected under Section 7 of the NLRA or prohibited by Section 8 of the NLRA, preemption is applicable where the activity in question is "arguably" subject to the provisions of the NLRA. Indeed, state regulation arising outside of the provisions of the NLRA would be preempted even in those areas where it might conceivably be concluded that the regulatory scheme in question did not conflict with the scheme set forth in the

NLRA. In this regard, it is the potential for conflict which is the touchstone of preemption. As this Court noted:

> In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. . . The governing consideration is that to allow the state to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 246 (1959). *See also, Street Employees v. Lockridge*, 403 U.S. 274 (1971); *Operating Engineers v. Jones*, 460 U.S. 669 (1983).

In the case below, the Court of Appeals found that the allegations set forth in the Third Party Complaint were not subject to *Garmon* preemption. The Court reached this decision notwithstanding that it has previously held that state law claims of fraud based on fraudulent misrepresentation regarding a collective bargaining agreement are preempted. *See, Serrano v. Jones & Laughlin Steel Company*, 790 F. 2d 1279 (6th Cir. 1986). The Court of Appeals decision also conflicts with the decisions of other United States Courts of Appeals. *See, Talbot v. Robert Matthews Distributing*, 961 F. 2d 654 (7th Cir. 1991); *Parker v. Connors Steel Co.*, 855 F. 2d 1510 (11th Cir. 1988).

The Court of Appeals distinguished its decision in *Serrano* and found that the allegations in the Third Party Complaint in the instant case were not preempted because they were unrelated to collective bargaining. In this regard, the Court relied upon the decision of the United States Court of Appeals for the Ninth Circuit in *Operating Engineers Pension Trust v. Wilson*, 915 F. 2d 535 (9th Cir. 1990) in distinguishing its own decision in *Serrano*. However, the Court of Appeals

reliance on *Wilson* is misplaced. In *Wilson*, the United States Court of Appeals found, in the face of a union's argument that the agreement at issue was a pre-hire agreement sanctioned by Section 8(f) of the NLRA, that the agreement in question was one that would allow the employer to operate his own equipment as a member of the union therein. *See, Operating Engineers Pension Trust v. Wilson*, 915 F. 2d 535, 540 (9th Cir. 1990).[2]

The agreements at issue herein are much more than simple owner operator agreements as were at issue in *Wilson*. Rather, these agreements, by their terms establish working conditions for employees working on the projects in question by directly referring to applicable collective bargaining agreements. Moreover, as demonstrated by the undisputed evidence, the Union and WF in fact dickered over whether or not the collective bargaining agreements to which WF would be bound if it signed the project agreements in questions would be applicable to all of its employees or solely those Union members referred to by the Union. In fact, the meaning of the handwritten notes on the project agreements were the primary focus of this entire litigation.

Thus, the decision of the Court below finding that there was no "collective bargaining" is incredible in the face of the undisputed evidence that the Union and WF in fact negotiated the issue of which employees would be subject to the provisions of the collective bargaining agreement.

Most important, however, the Court's finding that the Third Party Complaint was not preempted because the Union

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[2] While not as issue herein, it should be noted that the 9th Circuit's decision in *Wilson* is suspect in any event inasmuch as it reaffirms the now discredited doctrine that federal courts have jurisdiction under Section 301 of the LMRA over suits which seek to attack the validity of a collective bargaining agreement. *See, Operating Engineers Pension Trust v. Wilson*, 915 F. 2d 535, 539 (9th Cir. 1990). Cf., *Textron Lycoming v. UAW*, 523 U.S. 653 (1998).

did not represent a majority of WF's employees is simply erroneous. In this respect, the Court of Appeals ignored the provisions of §8(f) of the NLRA, 29 U.S.C. § 158(f).

Section 8(f) of the NLRA provides that:

> it shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon there employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of [Section 9 of the NLRA] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment which such employer, or give such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority and opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area . . .

Section 8(f) of the NLRA, 29 U.S.C. Section 158(f). As this Court has held, the very purpose of Section 8(f) is to permit the making of pre-hire agreements with unions in the construction industry which do not necessarily have the majority support of an employer's employees. *See, NLRB v. Iron Workers Local, 103*, 434 U.S. 335 (1978). Indeed, such agreements are enforceable under Section 301 of the LMRA. *See, Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983). In this regard, the National Labor Relations Board has developed an

entire body of labor law regarding agreements entered into pursuant to Section 8(f) of the NLRA. *See, e.g., John Deklewa & Sons*, 282 NLRB 1375 (1987), enforced, *Iron Workers Local 3 v. NLRB*, 843 F. 2d 770 (3rd Cir. 1987), *cert. denied*, 488 U.S. 889 (1988).

Therefore, inasmuch as it is clear that the Union and WF entered into a series of pre-hire agreements sanctioned under Section 8(f) of the NLRA, and in fact negotiated and dickered over which employees would be subject to the terms of resulting collective bargaining agreement and the number of employees who would be referred by the Union, it was clearly error for the Sixth Circuit to find that the parties course of conduct was somehow outside the scope of the provisions of the NLRA and to find that the Union's conduct was not preempted because it was neither arguably protected nor prohibited by the provisions of the NLRA.[3] Clearly, the Certiorari review is appropriate to correct the lower court's misinterpretation of this Court's precedents.

C. The Sixth Circuit's Opinion is in direct conflict with this Court's §301 preemption jurisprudence.

Even assuming for the sake of argument that the Court of Appeals was correct that the Third Party Complaint was not preempted under *Garmon* and its progeny, the Court of Appeals Decision is erroneous on another basis. Namely, the

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[3] For the same reasons, the Court of Appeals also erred when it held that the Union had failed to carry its burden of showing that the conduct at issue was prohibited or protected by the NLRA, relying on *International Longshoremen's Association v. Davis*, 476 U.S. 380 (1986). In this respect, the Union repeatedly demonstrated to the Courts below that the conduct which was the subject of the Third Party Complaint arose in the context of negotiating over the terms of the project agreements. Indeed, it was the United States Court of Appeals for the Sixth Circuit which raised the issue for the first time that the Union's conduct was not collective bargaining.

allegations set forth in the Third Party Complaint should have been found to be preempted under the provisions of Section 301 of the LMRA.

While preemption under *Garmon* and its progeny seek to preempt state regulation in order to protect the primary jurisdiction of the National Labor Relations Board and avoid regulation of economic weapons that Congress meant to leave unregulated, preemption under Section 301 of the LMRA rests on the principle that a unified body of federal law should govern actions regarding the interpretation and enforcement of collective bargaining agreements. *See, Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). Thus, this Court has held that where a right asserted by a Plaintiff has its foundation in a collective bargaining agreement and the claim could have been pleaded as a claim under Section 301 of the LMRA,

> [u]nless federal law governs that claim, the meaning of . . . provisions of the labor agreement would be subject to varying interpretations, and the congressional goal of a unified federal body of labor-contract law would be subverted. The requirements of Section 301 . . . cannot vary with the name appended to a particular cause of action.

See, Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985). As a result, when the resolution of a state law claim is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract" the claim must be treated as a Section 301 claim or dismissed as preempted by federal labor law. *See, Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). *See also, IBEW v. Hechler*, 481 U.S. 851 (1987).

Contrary to the finding of the Courts below, resolution of the allegations set forth at the Third Party Complaint requires substantial interpretation of the collective bargaining agreement. In particular, and what proved to be the main point of contention between the parties in the Courts below, is the

meaning of the notations on the project agreements. Thus, a determination of the fraud claims set forth in the Third Party Complaint require an interpretation of what the parties meant by way of the notations that they entered into on the project agreements.

Furthermore, any resolution of the fraud and misrepresentation allegations set forth in the Third Party Complaint requires interpretation of the collective bargaining agreements which served as the basis for the suit initiated by NOA in this matter. Thus, by its terms, the Third Party Complaint depends upon whether or not the Courts below interpreted the collective bargaining agreements to encompass more employees then the two (2) Union members that the Union was to refer to the various projects. *See*, App. D. Indeed, the District Court engaged in a searching analysis of the terms of the collective bargaining agreement itself in order to determine on whose behalf WF was required to make contributions for pension and benefits.

It is only upon completion of that analysis, and a determination of the parties' rights and responsibilities under said agreement, that the causes of action alleged in the Third Party Complaint can be determined. Clearly, the Court of Appeals misread this Court's Section 301 preemption jurisprudence when it affirmed the District Court's opinion. Therefore, Certiorari review is appropriate.

D. The Sixth Circuit's Opinion is in direct conflict with this Court's decision in *Atkinson* and with Ohio Law.

Finally, the Sixth Circuit Court of Appeals erred when it affirmed the District Court's holding that Helldobler was not immune from suit.

In this respect, inasmuch as the Court of Appeals erred when it affirmed the District Court's finding that the allegations in the Third Party Complaint were not preempted

by Section 301 of the LMRA, it is clear that the provision of Section 301(b) of the LMRA are fully applicable and that as a result Helldobler is statutorily immune from suit. *See*, *Atkinson v. Sinclair Refining Company*, 370 U.S. 238 (1962).

However, even if the instant case is not governed by the provisions of Section 301(b) of the LMRA, in any event Helldobler was entitled to immunity. In this respect, assuming that the causes of action alleged in the Third Party Complaint were all governed by Ohio law, as held by the District Court and by the Court of Appeals, then under Ohio law Helldobler was entitled to immunity. Thus, the Courts of the State of Ohio have found that officers, employees, and agents of a labor organization are immune from personal liability for acts undertaken as Union representatives. *See*, *Collins v. Lefkowitz*, 66 Ohio App. 3d 378, 584 N.E. 2d 64 (1990); *Sellers v. Doe*, 99 Ohio App. 3d 249, 650 N.E. 2d 485 (1994). In light of these clear expressions of Ohio law, the Court of Appeals was certainly not free to impose its own version of the same.

CONCLUSION

Therefore, for the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-3536

NORTHWESTERN OHIO ADMINISTRATORS, INC.,
Plaintiff,

v.

WALCHER & FOX, INC.,
Defendant-Appellee/
Third-Party Plaintiff,

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL,
AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 55;
VAL HELLDOBLER,
Defendants-Appellants/
Third-Party Defendants.

No. 00-3538

NORTHWESTERN OHIO ADMINISTRATORS, INC.,
Plaintiff-Appellee,

v.

WALCHER & FOX, INC.,
Defendant-Appellant/
Third-Party Plaintiff,

Appeal from the United States District Court
for the Northern District of Ohio at Toledo
No. 98-07443—David A. Katz, District Judge

Argued: August 8, 2001
Decided and Filed: November 6, 2001

Before: KEITH, NORRIS, and BATCHELDER, *Circuit Judges*.

OPINION

ALICE M. BATCHELDER, *Circuit Judge*.

These two interlocutory appeals arise out of a single case, and we have therefore consolidated them for purposes of this appeal. Plaintiff-Appellee Northwestern Ohio Administrators, Inc., ("NOA") a non-profit corporation that administers employee benefit plans under the Employment Retirement Income Security Act ("ERISA") and the Labor Management Relations Act ("LMRA"), sued Defendant-Appellant Walcher & Fox Inc. ("W&F"), an Ohio corporation engaged in the construction business, claiming that W&F owed fringe benefit and pension fund contributions for all of its employees pursuant to project agreements entered into by W&F and the International Association of Bridge, Structural, and Ornamental Ironworkers Local Union No. 55 ("the Union"). NOA moved for partial summary judgment and the district court denied the motion, holding that the project agreements were ambiguous because hand-written notations on some of those agreements indicated that the parties may have intended the agreements to cover only the few union members hired by W&F at the behest of the Union's representative Val Helldobler. W&F impleaded the Union and Helldobler, alleging that they had fraudulently misrepresented the scope of the project agreements and that they were therefore liable for contribution and indemnification for any monies owed by W&F to NOA. The Union and Helldobler moved to dismiss W&F's third-party complaint.

The district court then trifurcated the case to determine (1) the scope of the agreements, (2) liability under the agreements, and (3) liability of the Union and Helldobbler. After a bench trial on the scope of coverage issue, the court concluded that NOA was entitled to rely on the type-written language of the agreements, and that the hand-written notations on those agreements were not sufficient to put NOA on notice of the "modification" envisioned by the parties. Accordingly, the court held, NOA was entitled to collect contributions for all of the Company's employees who worked under the project agreements regardless of whether the parties intended to limit the benefits available under the project agreements to a handful of Union employees. The court certified the issue for interlocutory appeal.

In their motion to dismiss the third-party complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), Helldobler and the Union claimed that the federal court did not have subject matter jurisdiction over the action and that the claims were preempted. The district court denied the motion to dismiss and certified the issue for interlocutory review.

We accepted both interlocutory appeals, and we AFFIRM both of the district court's orders.

I. Factual Background

This case arises out of an on-going employment dispute between the Union and W&F. W&F is a construction subcontractor primarily engaged in the erection of pre-engineered steel buildings; it contracts with employees on a project-by-project basis. For most of its existence, W&F used exclusively non-union labor. Val Helldobler, an organizer for the Union, approached the owners of W&F in September of 1996, requesting that W&F unionize its workforce. The owners declined, claiming that W&F could not afford to pay Union wages and benefits to all its employees. Helldobler

suggested that W&F ease into unionization by hiring one or two union workers per job. It was Helldobler's hope that this incremental approach would demonstrate to W&F the "advantages of a Union workforce."

W&F and the Union negotiated a compromise, and Helldobler made hand-written notations on two of the printed Project Agreement forms. One of those Agreements bears the notation "2-men Arkam Steel job only;" the other bears the handwritten note "1 Journeyman & 1 Apprentice 8th man weekly benefit pay." These markings appear near the signature line of the agreements and no reference to them appears anywhere in the body of the agreement. The three remaining agreements that are the subject of this action contain no such notations, but W&F alleges that they were entered into on similar terms. Helldobler denies that the parties agreed to limit union participation on any project, and states that the handwritten notations indicate a floor for union participation, rather than a ceiling.

Each of the Project Agreements—entitled "Employer Participation Agreements"—at issue in this case incorporates the terms and conditions of the Collective Bargaining Agreement ("CBA") entered into by the Labor Relations Division of the Associated General Contractors of Northwest Ohio and the Union. Those Employer Participation Agreements provide:

> 1. The Company [1] hereby recognizes the Union as the representative of a majority of its employees designated, acknowledges receipt of a copy of the current Bargaining Agreement and agrees to be bound by the terms and conditions contained therein . . . .
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> * * *

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[1] Each agreement expressly provides that Walcher & Fox is "The Company."

> 4. The Company agrees to make the contributions and deductions to the said Plans at the times and in the amounts specified in the Bargaining Agreement, for all its employees performing the work specified in the Bargaining Agreement.

The CBA provides that each Participating Employer shall:

> make payments of fringe contributions and deductions to each and every employee benefit plan for all employees of each such Participating Employer who are members of the collective bargaining unit represented by the Union (whether or not the employees are members of the Union).

(CBA, Art. XXVI(B) Par. 148).

W&F presented testimony that the agreements were intended to cover the Union workers only, and not all employees. Between September 1996 and September 1997, W&F paid fringe benefit and pension contributions for the Union employees, and administered its own benefit plan for the non-union employees. Helldobler picked up the weekly benefit checks for the Union members. In September of 1997, Helldobler attempted to organize the non-union workers at the job site but they universally declined to join. Despite the apparent lack of interest on the part of W&F's non-union employees, Helldobler demanded that W&F employ only Union workers for two projects in the Toledo, Ohio, area. W&F refused to accept Helldobler's ultimatum, and the dispute soon escalated to include Union picketing of W&F. Shortly thereafter, Helldobler notified NOA that W&F had failed to make the fringe benefit and pension contributions that Helldobler claimed the CBA provisions incorporated into the Project Agreements required for all of W&F's employees.

In October of 1997, NOA requested that W&F allow a payroll audit for all employees working on the projects covered by the five agreements to determine whether W&F

was properly paying the fringe benefit contributions for its employees. W&F refused, claiming that NOA had the right to audit only the records of the handful of Union employees performing work under the Project Agreements. This lawsuit ensued.

II. Standard of review

Because this is an interlocutory appeal, we have no authority to review the district court's findings of fact, but must confine our review to pure questions of law. *See Foster Wheeler Energy Corp. v. Metro Know Solid Waste Auth., Inc.* 970 F.2d 199, 202 (6th Cir. 1992). We review the district court's conclusions of law de novo. *Barnes v. Winchell*, 105 F.3d 1111, 1115 (6th Cir. 1997).

III. NOA's right to collect contributions

W&F claims that the district court's determination on the motion for partial summary judgment, in which the court found the handwritten notations on the Agreements ambiguous, contradicts the court's later conclusion that W&F is required to remit to NOA contributions for all of W&F's employees. NOA counters that following the bench trial, the district court found that the Agreements were not ambiguous; that the written terms of those Agreements required W&F to make contributions for all of its employees; and that established ERISA law entitled NOA to rely only on the printed terms of those Agreements.

It is true that in denying NOA's motion for partial summary judgment, the district court found that because of ambiguity in the Agreements, the court could not determine the intent of the parties. But following the bench trial on the sole issue of whether W&F was obligated under the Agreements to make contributions on behalf of all of its employees, the district court held as a matter of law that the intent of the parties is not relevant to this issue. Citing *Central States,*

Southeast and Southwest Areas Pension Fund v. Gerber Truck Serv., Inc., 870 F. 2d 1148, 1149 (7th Cir. 1989), the district court held that section 515 of ERISA permits multi-employer plans to enforce the plain terms of the written agreement regardless of contractual defenses applicable to the original parties, so long as the written document does not place the plan on notice of any modifications. Further, citing *Bakery and Confectionary Union and Indus. Int'l Health Benefits and Pension Funds v. New Bakery Co. of Ohio*, 133 F.3d 955, 959 (6th Cir. 1998), the court held that the actual intentions of the contracting parties, and hence the factual dispute between Helldobler and W&F, are immaterial to this issue.

As we have already pointed out, this matter is before us on an interlocutory appeal, and we are without authority to inquire into the correctness of the district court's findings of fact with regard to the intentions of the parties and whether the notations on the Agreements reflected those intentions. Rather, we must decide whether the district court erred in holding that, as a matter of law, the intentions of the contracting parties are immaterial to the determination of W&F's obligation to make the contributions, and that the written notations made by W&F and the Union were not sufficient to place NOA on notice that it could not rely solely on the typed language of the Project Agreements and the CBA.

W&F argues that third-party beneficiary NOA's right to collect contributions flows from the CBA and therefore cannot be superior to the rights of the primary parties. For this proposition, it cites a district court opinion, *Central States, Southeast and Southwest Areas Pension Fund v. Kroger Co.*, No. 93 C 3699, 1998 Dist. LEXIS 3283 (N.D. Ill. March 17, 1998). In that case, the district court denied the plaintiff's motion for summary judgment because the plaintiff sought to rely on past practices and oral understandings of the contract not reduced to writing. Although it makes clear that a

pension fund's rights to collect are bounded by the written CBA, *Kroger* does not address the situation before us here, in which the parties memorialized their modifications on the face of a contract, albeit ambiguously. In fact, *Kroger* plainly spells out the ERISA policy that "pension funds are entitled to rely on the writings that establish the employer's obligation to them," *id.* at *18, concluding that an oral agreement between the employer and the union to disregard the text and course of performance cannot prevent the written agreement from being enforced at the insistence of the pension funds because "[a]ny less protection 'may well saddle the plans with unfunded obligations.'" *Id.* at *16 (citations omitted).

W&F also cites the unreported *Craig v. Severino, Inc.*, No. 93-3516, 1994 U.S. App. LEXIS 14715 (6th Cir. June 13, 1994). W&F's reliance on *Severino* is misplaced. In *Severino*, the parties signed a duplicate of a collective bargaining agreement, but specified in writing on the contract that it was limited in scope to just one job. The court found that the parties had executed a new agreement, with the limitation included. In the case at bar, there is no question that the Union and W&F sought to amend the Project Agreements in some way. The question is whether they put NOA on notice of the intended amendments by making what the district court described as "cryptic" notations on the pre-printed agreement. In *Severino*, the limitation was clearly spelled out at the top of the signature page of the contract. Here, only two of the Project Agreements bear any handwritten markings at all, and they are inserted near the signature line rather than in the body of the contract, or adjacent to any related provision. Moreover, as the district court correctly noted, the parties made no attempt to excise, cross-out, or otherwise manifest their intent to nullify the portion of the pre-printed contract that required that benefits be paid for both union and non-union employees, or otherwise to call attention to the modification.

Even if the notations on the Project Agreements perhaps should have caught the attention of an NOA administrator, nothing in the Agreements indicated that the notations were intended to supercede the unambiguous printed portions of the Agreements. The district court correctly applied the well-established precedent that ERISA funds are accorded a special status and are entitled to enforce the writing, regardless of what defenses may be available under the common law of contracts. *See New Bakery Co. of Ohio*, 133 F.3d at 959 ("The fund stands much like a holder in due course in commercial law who is entitled to enforce the writing 'without regard to understandings or defenses applicable to the original parties.'")(citation omitted). The district court also relied on *Gerber Truck Serv., Inc.*, 870 F.2d 1148, which presents a factual scenario similar to the one before us today. The *Gerber* court articulated the policy of section 515 of ERISA, namely, that the administrator is not required to look into potential side agreements. This court has adopted the *Gerber* position. *See New Bakery Co. of Ohio*, 133 F.3d at 959 ("Because, under section 515, multiemployer plans are entitled to rely on the literal terms of written commitments between the plan, the employer, and the union, the actual intent of and understandings between the contracting parties are immaterial.").

Whether a contract term is ambiguous is a question of law for the court to determine. *Tennessee Consol. Coal Co. v. United Mine Workers of Am.*, 416 F.2d 1192, 1198 (6th Cir. 1969). The district court concluded that the handwritten notations in the two Agreements were ambiguous. We agree. The law of this circuit does not require fund administrators to read the minds of contracting parties; rather, administrators may rely on the unambiguous terms of the writing. *See New Bakery Co. of Ohio*, 133 F.3d at 959. Here, the cursory and non-specific notes on two of the five Project Agreements were the only pieces of information NOA had that the parties

might have intended any modification. Without more, these notations do not indicate an intent to supercede the unambiguous typed provisions.

W&F also claims that the entire contract is void because the district court ruled that "the attempted amendments, if effective, would have produced an illegal contract." But the district court did not hold that those attempted modifications were in fact effective; rather, the court opined that the handwritten notations, if interpreted as modifying the contract in the way in which W&F claims, would make the contract illegal, and that NOA had no reason to suppose that those handwritten notations were intended to modify the contract so as to render it illegal. The district court's observation on this issue has nothing to do with whether NOA was on notice that a side agreement had been reached.

Accordingly, we AFFIRM the district court's decision that NOA was entitled to rely solely on the printed terms of the Project Agreements.

IV. Motion to Dismiss Third-party Complaint

In its third-party complaint, invoking both supplemental jurisdiction and jurisdiction under 29 U.S.C. § 185(c) (2001), W&F claims that the Union and Helldobler fraudulently induced W&F to enter into the Project Agreements, fraudulently executed the Project Agreements, and negligently misrepresented the scope of those Agreements; W&F demands a declaratory judgment that because of the Third-Party Defendants' fraud, the Project Agreements are either void or voidable, and further seeks a judgment against them for indemnification, compensatory and punitive damages, and attorney's fees. The Union and Helldobler claim that the district court erred in refusing to dismiss the third-party complaint against them pursuant to Federal Rules of Civil Procedure 12 (b)(1) and (6). Specifically, they claim that: (1)

the third-party complaint is subject to dismissal under the rule of *Textron Lycoming Reciprocating Engine Div. Avco Corp. v. U.A.W.*, 523 U.S. 653 (1998); (2) the complaint is preempted by the rule of *San Diego Bldg. Trades Council v. Garman*, 359 U.S. 236 (1959); (3) the complaint is preempted by section 301 and therefore subject to dismissal; and (4) Helldobler is immune from suit as an individual, pursuant to section 301 (b) and the rule in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962).

We find these claims to be without merit and AFFIRM the district court's denial of the motion to dismiss.

A. Supplemental Jurisdiction

Helldobler and the Union first claim that the federal court lacked jurisdiction over the third-party complaint because of the limitations set out by the Supreme Court in *Textron*. In that case, the Court concluded that section 301(a) of the LMRA "confers federal subject-matter jurisdiction only over '[s]uits for violation of contracts,'" *Textron*, 523 U.S. at 656, and that "'[s]uits for violation of contracts' under § 301 are not suits that claim a contract is invalid, but suits that claim a contract has been violated." *Id.* at 657. Because W&F does not claim in its third-party complaint that the Union and Helldobler violated the CBA but instead claims that the third-party's actions render the Project Agreements void, the Defendants argue, the federal court lacks jurisdiction over the complaint. The Union and Helldobler have missed the point. While W&F has indeed asked for a determination that the Project Agreements are void or voidable, it has also asked for judgment against the Union and Helldobler for indemnification and damages in the event W&F is found liable to NOA for the additional contributions—liability that W&F claims arose only because of the Third-Party Defendants' fraud and misrepresentation. The third-party complaint does not present a *Textron* situation, and it is immaterial that the fraud

and misrepresentation claims are not cognizable under section 301. Those claims are clearly within the supplemental jurisdiction of the federal court as spelled out in 28 U.S.C. § 1367 (a) (2001):

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Neither subsection (b) nor (c) is applicable here. Therefore, unless the district court lacked subject matter jurisdiction for some reason other than the *Textron* rule, which is inapposite here, these claims are properly within the supplemental jurisdiction of the court, arising as they do out of exactly the same facts that gave rise to NOA's complaint against W&F.

The Union and Helldobler also claim that no case or controversy exists because the Project Agreements have expired. This claim is also meritless. W&F has now been held liable to NOA for contributions far in excess of what it allegedly believed it was bound by those Agreements to make. What is at issue in this third-party complaint is whether the Union and Helldobler are liable to W&F for their alleged fraud in inducing W&F to enter into those Agreements, their alleged fraud in the execution of those Agreements, and their alleged misrepresentations as to the number of employees covered by those Agreements. The fact that the Agreements themselves have now expired is immaterial.

B. Garmon Preemption

The Third-Party Defendants next claim that the third-party complaint is preempted by federal law under the rule in *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959). The party arguing *Garmon* preemption bears the burden of showing that the conduct at issue is prohibited or protected by the National Labor Relations Act, 29 U.S.C. § 158 (2001), ("NLRA"). *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395 (1986).

In *Garmon*, the Supreme Court synthesized its prior NLRA preemption cases: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245. The Supreme Court was motivated by the expressed congressional desire for uniformity in the nation's labor policy. *Id.* at 242. To allow the Board to create uniform labor regulations for the nation's workers and employers, and to make use of the Board's expertise in the area of labor relations, the Court sought to exclude the states from the initial process of construing the reach and application of the NLRA.

This same underlying motivation for uniformity, and the principles of federalism, also allowed for exceptions to the general *Garmon* preemption rule. Thus, where the regulated conduct at issue "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act," the Court would not find NLRA preemption. *Id.* at 244. Likewise, where the regulated activity is "merely peripheral" to the central concerns of the NLRA, the states may regulate the activity. *Id.* at 243.

The extent of the NLRA's preemption was elucidated further in *Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978). In that case Sears brought a trespass action in state court to enjoin the union from picketing on its property. *Id.* at 183. The Supreme Court ruled that the NLRA did not preempt the employer's state trespass action. *Id.* at 198. The Court refused to apply *Garmon* preemption mechanistically and instead opted for a flexible balancing of the federal need for uniformity, the state's interest in regulating the conduct at issue, and the potential for the state's regulation to threaten unduly the federal regulatory scheme. *Id.* at 188-89. The Court explained that when the conduct is "arguably" prohibited, two factors weigh in determining whether state regulation is preempted: (1) whether there exists a "significant" state interest in protecting its citizens from the conduct; and (2) whether state jurisdiction over the arguable labor violation would entail "little risk" of interfering with the uniform national labor policy. *Id.* at 196. The second of these factors is equivalent to the question of whether the state cause of action is "identical" to a claim that could have been made to the Board. *Id.* If the state-based claim and a potential claim to the Board are identical, then the Board has exclusive jurisdiction because the state regulation impinges directly on the Board's prerogative to fashion a uniform labor policy. *Id.* In *Sears*, the Court ruled that the state trespass law regulated the location of the picketing, while a claim to the Board would have looked at the motive behind the picketing to discern whether the picketing was an unfair labor practice. *Id.* at 198. Because the two claims were not identical, and because the state has a strong interest in protecting the integrity of its citizens' property, the state could permissibly regulate the union's picketing on the employer's property. *Id.* at 198-200.

Later decisions have further expanded the rationale of *Garmon* and have also displayed the extent of the exceptions to *Garmon*. In *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the Court rejected a claim of *Garmon* preemption based on state-law misrepresentation and breach of contract claims brought by replacement workers against their former employer. There, the employer had promised the replacement workers that they would retain their jobs even after the settlement of the labor dispute with the union. *Id.* at 494-96. However, as a result of unfair labor practice charges Belknap agreed to lay off its "permanent" replacement workers and rehire the strikers. *Id.* at 496. The Supreme Court held that the replacement workers' state suit against Belknap for fraud in relation to Belknap's promise to the replacements was not preempted because the state claim for fraud was not identical to the unfair labor practice claim brought by the striking workers. *Id.* at 510-11. Since the Board was not concerned with Belknap's representations to the replacement workers, and the replacement workers' suit had no impact on the strikers' unfair labor claims, the state regulation would not interfere with national labor policy as elucidated by the Board. *Id.* Finally, the Court found that the state's interest in protecting its citizens from misrepresentations was a "substantial interest." *Id.*

Before we address the *Garmon* factors, we must first address the threshold question of whether the Union's conduct at issue here is arguably prohibited by section 8.[2] The state law counterclaim brought by W&F is for fraud in the inducement. The claim is based on the allegedly fraudulent misrepresentations made by the union representative to induce W&F to sign agreements providing for the em-

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[2] The union does not argue that the activity at issue is arguably subject to section 7.

ployment of a discrete number of union employees on particular jobs at particular job sites.

The Ninth Circuit faced a very similar situation in which the employer filed a third-party complaint against a union for fraudulent inducement. *Operating Eng'rs Pension Trust v. Wilson*, 915 F.2d 535 (9th Cir. 1990). The Ninth Circuit ruled that the union's actions were not "arguably" prohibited as an unfair labor practice. *Id.* at 540. As a result, *Garmon* did not even apply and there was thus no need to reach the question of whether a *Garmon* exception applied. *Id.* Likewise here, the Union has offered no evidence demonstrating that its activities are unfair labor practices. The agreement in question is not a collective bargaining agreement because the union was not the duly elected representative of a majority of the employees, and was not authorized to bargain on the employees' behalf on the terms and conditions of employment. The Union has offered nothing to support its assertion that the conduct at issue in W&F's counterclaim is arguably prohibited by the NLRA, and has therefore failed to meet its burden to show preemption.

The result would be different if the Union had made a misrepresentation connected with a collective bargaining agreement. In *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986), this court ruled that a state claim of fraud based on an employer's fraudulent misrepresentations concerning a collective bargaining agreement was preempted because the employer also breached its duty of good faith found in section 8. Unlike the situation here, the state claim involved a collective bargaining agreement, was identical to a claim that could have been brought before the Board, and the Board thus had exclusive jurisdiction under *Garmon*. It was the presence of a collective bargaining agreement and all of the duties attendant to the bargaining process—which are absent here—that caused the preemption of the state law claim in *Serrano*.

Cases in which the Supreme Court found that state law claims were not preempted are applicable to the circumstances here presented. In *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395 (1986), for example, the state law claim at issue was one of fraud and misrepresentation against the union. The union had represented to an employee that he was protected from discharge by the NLRA because he was not a supervisor but rather was an employee. *Id.* at 394. The union argued that the state based claim for fraud was arguably identical to the unfair labor practice of discharging an employee for protected union activities. *Id.* The Court spoke specifically to the Union's burden in arguing preemption:

> The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim, without more, that Davis was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor.

Id. at 394-95. Because the union had failed to provide any evidence that the employee was "arguably" not a supervisor, the Court held that the union had failed to show that the employer's action of firing the employee was "arguably" an unfair labor practice. *Id.*

The case before this court is similar to *Davis* in that the Third-Party Defendants have failed to offer any evidence that this "case is one that the Board could legally decide in [the Union's] favor." *Id.* at 395. Here, the Union appears to claim that its allegedly fraudulent conduct occurred during the collective bargaining process and implicates the duty of good faith required during that process. It is indisputable, however, that the Union was not the representative of W&F's employees and was thus not engaged in collective bargaining. Hence, the

Union has failed to show that the activity W&F complains of was "arguably" covered by section 8 of the NLRA.

The policies underlying the range and extent of *Garmon* preemption also counsel a finding of no preemption. The conduct complained of here can be distinguished from protected or prohibited labor practices because the dispute has nothing to do with the process of collective bargaining, the rights of workers to bargain collectively, or the balance of power between labor and management. In this case, the Union is not representing any employees. There is no dispute between employees and management. The dispute is between the administrator of the pension and benefit fund (a third-party beneficiary) and the Company. Since this dispute presents no threat to the uniformity of federal labor law, and the Board's position as the authoritative interpreter of the NLRA is not threatened, the policies underlying *Garmon* do not require preemption.

In sum, because the Union has failed to demonstrate that its conduct was arguably prohibited by section 8 of the NLRA, *Garmon* preemption does not apply.

C. Section 301 Preemption

The Union and Helldobler next argue that the state law claim asserted in the third-party complaint is preempted by section 301 of the LMRA. Under their theory, the state claim should be preempted under federal law because the issues the court must determine are "inextricably intertwined with the terms of the labor contract."

Section 301 grants to the courts of the United States jurisdiction over issues pertaining to collective bargaining agreements. The Supreme Court has construed section 301 as a grant from Congress to create a federal common law of labor contracts. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The grant is necessary to ensure uniform

national interpretation of labor agreements and thus to ensure that rights and duties are clearly understood and to lessen industrial strife occasioned by conflict over differing interpretations of collective bargaining agreements. *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 855-57 (1987).

Since federal law is the exclusive law used to interpret the duties and obligations contained within collective bargaining agreements, any state law claim that is not independent of rights established by an agreement, and that is "inextricably intertwined" with a determination of the meaning of the terms of an agreement, is preempted by section 301. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). Thus, if a state tort relies on or entails interpretation of a collective bargaining agreement, the state claim is preempted. *Id.* at 217-18. In *Allis-Chalmers* for example, the Court found that the Wisconsin cause of action, alleging a breach of good faith in performance of a contract, was preempted by section 301 because the "state-law rights and obligations . . . [did] not exist independently of" the collective bargaining agreement. *Id.* at 213.

The Supreme Court has further defined when a state law right or duty is independent of a collective bargaining agreement, holding that even if the state claim requires a court to discuss and evaluate the same facts as it would when interpreting the agreement, so long as the court is not actually interpreting the agreement, there is no preemption. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988). If the state claim is not "substantially dependent" upon an interpretation of the agreement, the cause of action is independent and can go forward. *Id.* at 410 n.10. In sum, any time a state cause of action requires the interpretation of a collective bargaining agreement, or invokes rights that are not independent of the agreement, section 301 preempts the claim.

Although section 301 has broad preemptive effect, this court has held that "[t]he preemptive reach of section 301 . . . is by no means boundless." *Fox v. Parker Hannifin Corp.*,

914 F.2d 795, 799 (6th Cir. 1990). "Section 301 preempts only state law claims that are 'substantially dependent on analysis of a collective bargaining agreement,' . . . not claims that only 'tangentially' involve CBA provisions." *Id.* at 799-800 (internal citations omitted).

The Ninth Circuit case, *Operating Eng'rs Pension Trust v. Wilson*, 915 F.2d 535 (9th Cir. 1990), involved facts similar to those in the case at hand. There, the court ruled that a state law claim of fraudulent inducement did not require interpretation of the collective bargaining agreement. *Id.* at 538. The agreement at issue was an owner-operator agreement that the union presented to the employer claiming that the employer had to sign it to continue work at that job site. *Id.* The Ninth Circuit held that the fraudulent inducement claim was not preempted because it did not require the court to interpret the agreement but instead involved only the facts surrounding the formation of the agreement without reference to the agreement itself. *Id.* at 538-39.

The claim advanced by W&F—that the Union fraudulently induced it to sign the Employer Participation Agreements—like the claim in *Wilson*, does not require interpretation of a collective bargaining agreement [3] or even of the Employer Participation Agreements themselves. Instead, the rights and duties at issue arise from the Union's actions prior to the formation of the Employer Participation Agreements. W&F alleges that the Union claimed it was seeking only to show W&F the benefits of having a union labor force, when in fact it was deceiving the employer into paying union benefits for all its employees. The relevant inquiry here concerns the representations made by the Union and/or Helldobler at the

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[3] Although the Employer Participation Agreements incorporate the terms of a collective bargaining agreement, as we have previously noted, W&F was not a party to the collective bargaining agreement and the Union was not authorized to bargain on behalf of W&F's employees

time the Project Agreements were executed, not any term of the Agreements themselves. Section 301 therefore does not preempt the third-party state law claim.

Finally, allowing the district court to rule on the fraud claim presents no threat to federal labor law. Because ruling on the fraud claim does not involve the interpretation of a collective bargaining agreement, ruling on that claim presents no challenge to the uniformity of federal law governing labor contracts. In short, section 301 does not preempt Walcher & Fox's claim of fraud in the inducement.

D. Individual immunity under *Atkinson*

Lastly, Helldobler claims that *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) *overruled on other grounds by Boys Markets, Inc., v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970) provides him immunity from suit. Helldobler misreads *Atkinson*. *Atkinson* addressed the question of whether individual union members could be held liable for the union's violation of a no-strike clause in their contract. The Supreme Court held that they could not. *Id.*, at 247-48. *Atkinson* does not stand for the more radical proposition advanced here by Helldobler, that union members are immune from suit for their individual acts simply by virtue of union membership. *See Felice v. Sever*, 985 F.2d 1221, 1230 (3d Cir. 1993) ("[The defendants] view the immunity extended by section 301(b) as covering all 'conduct related to their actions as Union officers.' . . . [T]he legal principle as enunciated by [the defendants] is too broad.").

Helldobler also cites two Ohio cases, *Sellers v. Doe*, 650 N.E.2d 485 (Ohio App. 1994), and *Collins v. Lefkowitz*, 584 N.E.2d 64 (Ohio App. 1990), in support of his claim of immunity. Each of these cases involved an attorney hired by the union to perform services on behalf of a union member in connection with the employer's disciplinary action against that union member. In each of those cases, the court held that

the attorney was an agent of the union performing services as part of the collective bargaining process and was therefore immune from suit for malpractice by the union member. The facts of these two cases are easily distinguished from those in the instant case, and whether the attorney was acting on behalf of the union was not at issue in either of them.

The issue of whether Helldobler was actually acting on behalf of the Union when he committed his alleged fraud is still open. More importantly, the immunity established by the Supreme Court in *Atkinson* and expanded in *Complete Auto Transit, Inc., v. Reis*, 451 U.S. 401, 417 (1981) (holding "that § 301(a) does not sanction damages actions against individual employees for violating the no-strike provision of the collective-bargaining agreement, whether or not their union participated in or authorized the strike"), is immunity from actions brought under section 301 for "violation of contracts between an employer and a labor organization." Labor Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a) (2001). We join the Third Circuit in concluding "that a state law claim brought against a union officer that does not implicate a collective bargaining agreement covered by section 301(a) does not give rise to section 301(b) immunity. When section 301(a) is inapplicable, the immunity provided by section 301(b) is also inapplicable." *Sever*, 985 F.2d at 1231.

The action before us today is not an action for violation of a contract between Walcher & Fox and the union. Walcher & Fox was not a party to the collective bargaining agreement with the union. Indeed, that fact is at the heart of Walcher & Fox's claims against Helldobler. Accordingly, we hold that Helldobler is not entitled to claim immunity from suit on this counterclaim.

Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed Oct. 21, 1999]

Case No. 3:98 CV 7443

NORTHWESTERN OHIO ADMINISTRATORS, INC.,
Plaintiff,

-vs-

WALCHER & FOX, INC.,
Defendant,

MEMORANDUM OPINION

KATZ, J.

This matter is before the Court on the motion to dismiss of Third-Party Defendants International Association of Bridge, Structural Ornamental & Reinforcing Iron Workers Local No. 55 ("the Union") and Val Helldobler. For the following reasons, Third-Party Defendants' motion to dismiss will be denied.

BACKGROUND

Plaintiff Northwestern Ohio Administrators, Inc. ("NOA") ("NOA") is a not-for-profit corporation that is charged with collecting employer contributions to various jointly-admininistered multi-employer employee benefit plans under the Employee Retirement Income Security Act ("ERISA") and the Labor-Management Relations Act ("LMRA").

Between September 18, 1996 and May 20, 1997, Defendant Walcher & Fox, Inc. ("the Company") and the Union entered into five separate Project Agreements obligating the Company to make fringe benefit and pension fund

contribution to nine separate employee benefit plans, for each of which NOA is the administrator. The parties dispute whether the Project Agreements oblige the Company to make benefit plan contributions on behalf of Union employees only, or on behalf of both Union and non-Union employees.

The Project Agreements incorporated the terms and conditions of the collective bargaining agreement ("CBA") entered into between the Labor Relations Division of the Associated General Contractors of Northwest Ohio and the Union. The CBA requires the Company to:

> make payments of fringe contributions and deductions to each and every employee benefit plan for all employees of each such Participating Employer who are members of the collective bargaining unit represented by the Union (*whether or not the employees are members of the Union*).

(CBA, Art. XXVI(B) ¶ 148 (emphasis added).) The Project Agreements also contain standard merger clauses, each providing that the written contract "constitutes the entire understanding and agreement on the matters covered herein and shall not be modified or amended except by the express written consent of the parties." Thus, the plain language of the printed portions of the Project Agreements, read in isolation, requires the Company to remit the required contributions for each employee on the covered projects, regardless of whether the employee is a Union member.

Defendant, however, has presented evidence that the parties intended the Project Agreements to cover only employees who were current Union members at the time contributions were to be made. The first Project Agreement, for a project known as the Arkam Steel project, was signed on September 18, 1996, after negotiations between Union business agent Val Helldobler and Company co-owners James Walcher and Jeffrey Fox. Walcher and Fox have each testified that the parties orally agreed that the Company's

fringe benefit contribution obligation applied only to employees who were also Union members, and that such agreement was memorialized on the first contract by means of a handwritten notation that reads "2-men Arkam steel job only." Helldobler denies that any such oral agreement was made, and says that the notation indicates only that the Union would provide two men for the Arkarn Steel project. The remaining four Project Agreements were entered on similar terms.

On October 13, 1997, NOA formally requested the Company to submit to a payroll audit for all of its employees performing work on all the projects covered in the Project Agreements. The Company refused, taking the position that it was required to submit to the audit only for its employees who were also members of the Union.

On August 3, 1998, NOA filed the instant lawsuit, claiming that the Company's refusal to submit to the payroll audit and to remit benefits contributions for all employees, rather than for Union employees only, constitutes a breach of the Project Agreements. It brought this action under § 301 of the LMRA, 29 U.S.C. § 185, and ERISA, 29 U.S.C. § 1132(e), seeking monetary and injunctive relief, liquidated damages, payment for an audit, and costs and attorney fees.

On July 29, 1999, the Company brought a third-party impleader action against the Union and Helldobler. The Company says that it entered into the Project Agreements on the basis of Helldobler's oral representations that the Company would be responsible to make fringe benefit and pension fund contributions only for employees who were Union members. In Count I of its third-party complaint, the Company seeks a declaratory judgment that the project agreements are void *ab initio* because of fraud in the inducement. In Count II, the Company brings a claim for indemnity and/or contribution in the event the Company is found liable to NOA, and for attorney fees. In Count III, the Company

brings claims of fraudulent misrepresentation against Helldobler and the Union. In Count IV, the Company brings claims, of negligent misrepresentation against Helldobler and the Union.

The Union and Helldobler have moved to dismiss all of the claims brought against them, on numerous grounds. The Company has filed opposition to Third-Party Defendants' motion, and Third-Party Defendants have replied thereto. The Court discusses the parties' contentions below.

DISCUSSION

A. Motions to Dismiss

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b), the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984), while viewing the complaint in a light most favorable to the plaintiffs, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir.1976). The Court is without authority to dismiss the claims unless it can be demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); *Westlake, supra*, at 858. *See generally* 2 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE, § 12.34[1] (3d ed. 1997).

B. Existence of Federal Subject Matter Jurisdiction

The first issue the Court must address, although it is not the first issue raised by Third-party Defendants in their brief, is whether the Court has subject matter jurisdiction to entertain the third-party complaint. If no such jurisdiction exists, the Court must dismiss the case for lack of jurisdiction without

addressing the merits of the Company's claim. *Campanella v. Commerce Exch, Bank*, 137 F.3d 885, 890 (6th Cir.1998).

1. *Original Jurisdiction*

The Company asserts that the Court has jurisdiction over Count I of its third-party complaint—that the CBA is void *ab initio* because of fraud in the inducement—pursuant to 28 U.S.C. § 1331, which gives the District Court jurisdiction over all disputes that raise questions of federal law, and the LMRA, which confers subject matter jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a).

The Supreme Court has held, however, that a suit seeking a declaratory judgment that a CBA is invalid is not a suit for "violation of contracts" under the LMRA. *Textron Lycoming Reciprocating Engine Div. v. UAW*, 118 S. Ct. 1626, 1629 (1998). Such a claim does not provide a federal court with original jurisdiction, and a federal court can rule on it only if an independent basis of subject matter jurisdiction exists upon which the claim can be brought. *Id.* Since the Company's claim on Count I is not that the Union or Helldobler violated the terms of a CBA, but that the CBA is void, that claim cannot arise under the LMRA or other federal law. Therefore, the Court must determine whether some other basis of federal subject matter jurisdiction exists.

Third-Party Defendants have argued—notwithstanding the argument contradicts their assertion that federal subject matter jurisdiction is lacking in this case—that the LMRA preempts the state law claims for indemnity, contribution, and fraudulent or negligent misrepresentation the Company seeks to bring in Counts II through IV of its third-party complaint. If Third-Party Defendants' contention is correct, federal preemption over those claims will provide a basis of original federal subject matter jurisdiction.

The Supreme Court has held that the LMRA not only provides federal subject matter jurisdiction over controversies directly involving collective bargaining agreements, but also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957). Collective bargaining agreements must be construed under federal law because:

> the subject matter of [the LMRA] is peculiarly one that calls for uniform law. . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. . . . The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is at the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. . . . We cannot but conclude that in enacting [the LMRA] Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.

Id. at 103-104. Thus, federal law preempts all state-law claims that require the interpretation of a CBA for their disposition. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985).

Not every dispute that involves a provision of a CBA is preempted, however. *Allis-Chalmers*, 471 U.S. at 211. The Court's preemption analysis focuses on whether evaluation of the state law claim is "inextricably intertwined with the terms of the labor contract," *Id.* at 213. When the meaning of the CBA is not at dispute, the mere fact that a CBA will be consulted in the course of the litigation is not sufficient to

form a basis for federal subject matter jurisdiction. *Livadas v. Bradshaw*, 512 U.S. 122, 124 (1994). A claim that can be resolved without interpretation of the CBA is not preempted. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394, 107 S. Ct. 2425, 2431, 96 L. Ed. 2d 318 (1987).

In this case, the parties do not dispute the terms of the CBA. Clearly, the CBA requires the Company to make fringe benefit contributions on behalf of all employees, whether or not the employees are members of the Union. The issue the Court must determine, both on the Trustees' underlying claim and on the Company's claim against the Union and Helldobler, is whether the Company entered into the Project Agreements at issue with the understanding that it had contractually opted out of that provision of the CBA on the basis of Helldobler's representations to the Company, and whether such understanding was sufficiently memorialized by the handwritten notations on the Project Agreements to be enforceable.

On these facts, the Court finds that the Company's claims are not preempted. The Company's claims do not arise out of the CBA. No interpretation of the CBA need be made. *Accord Voilas v. General Motors Corp.*, 170 F.3d 367, 372-78 (3d Cir. 1999) (fraudulent representation claim not preempted by LMRA); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217; 231-32 (3d Cir.1995) (same).[1] Counts II through IV arise under state law.

All of the Company's claims in this third-party action arise under state law. No claim has been made that diversity jurisdiction, or any other basis of original jurisdiction exists.

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[1] Third-Party Defendants have cited to two pre-*Textron* Sixth Circuit cases holding the opposite. *Adkins v. General Motors Corp.*, 946 F.2d 1201 (6th Cir.1991); *Martin v. Associated Truck Lines, Inc.*, 801 F.2d 246 (6th Cir.1986). The reasoning of those cases has been abrogated by *Textron*.

The Court, therefore, proceeds to address the issue of whether it has supplemental jurisdiction over the third-party action.

2. *Supplemental Jurisdiction*

The parties do not dispute that the Court has jurisdiction over the underlying action by the Trustees pursuant to 28 U.S.C. § 1331. Under the supplemental jurisdiction statute, the Court also has subject matter jurisdiction over any "claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a).

It is clear in this case that the Company's claims are closely related to the claims that form the basis of the Court's original jurisdiction, and that those clams form the basis of the same case or controversy. Indeed, the very definition of the impleader rule—derivative liability—mandates such a finding. *See* 3 James Win. Moore, MOORE'S FEDERAL PRACTICE § 14.41[4][a]. Under the plain language of the supplemental jurisdiction statute, therefore, the Court has jurisdiction over all of the state law claims brought by the Company.

Third-Party Defendants have argued, however, that the Company cannot use the Court's jurisdiction over the Trustees' action to "bootstrap" its fraud and misrepresentation claims against the Union and Helldobler into federal court.

Third-Party Defendants' argument lacks merit. The supplemental jurisdiction statute expressly provides that such Jurisdiction includes "'claims that involve the joinder . . . of additional parties." 28 U.S.C. § 1367(a). It places no limitations, other than the general relatedness test given in § 1367(a), on the parties who may be brought to suit, so long as the joinder of new parties does not destroy complete diversity in a case where jurisdiction is founded solely on diversity of citizenship. *See* 28 U.S.C. § 1367(b). Since this is not a diversity case, that one exception does not apply. It is

undisputed in this case that the Company's claims arise out of the same transactions and occurrences giving rise to the underlying claims brought by the Trustees. Therefore, the Court has supplemental jurisdiction over those claims.

C. Garmon Preemption

The Union and Helldobler have also argued that this case is subject to dismissal under the rule set forth in *San Diego Building Trades Council v. Garrison*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), which protects the exclusive jurisdiction of the National Labor Relations Board ("NLRB") over unfair labor practice proceedings. Under *Garmon*, state law causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the National Labor Relations Act ("NLRA"). *Belknap, Inc. v. Hale*, 463 U.S. 491, 498, 103 S. Ct. 3172, 3177, 77 L. Ed. 2d 798 (1983). Since fraudulently inducing an employer to enter into a collective bargaining agreement is arguably an unfair labor practice that violates the union's statutory obligation to bargain in good faith, *see* 29 U.S.C. § 158(b)(3) & (d), a presumption arises that the NLRB is the exclusive forum to remedy the conduct at issue in the Company's third-party complaint.

At the same time, the Supreme Court has explained that "nflexible application of the [*Garmon*] doctrine is to be avoided, *Farmer v. Carpenters*, 430 U.S. 290, 302 (1977), and has carved out a number of exemptions to *Garmon* preemption in the forty years since *Garmon* was decided. Thus, *Garmon* preemption does not apply to cases where Congress has provided remedies for prescribed conduct independent of those available in an NLRB proceeding, where the activity complained of is merely a peripheral concern of the labor laws, where the activity touches a deeply rooted state or local interest, or "where the particular rule of law sought to be invoked before another tribunal is so

structured and administered that . . . it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Id.* at 296-97.

Most important in the context of this case, however, is the rule that the rationale underlying *Gannon* preemption does not apply when the aggrieved party does not have a reasonable opportunity to invoke the jurisdiction of the NLRB. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 201-03 (1978); *John S. Griffith Constr. Co. v. United Bhd. of Carpenters*, 785 F.2d 706, 710-11 (9th Cir.1986). The Company is in this case involuntarily, and in a defensive posture. It did not choose the forum in which the dispute is to be adjudicated; the Trustees did. Since the Trustees' action against the Company is not within the NLRB's jurisdiction, the Company has no power to have the case transferred, *in toto*, to the jurisdiction of the NLRB. Nor could the Company have brought its impleader claim before the NLRB as a separate action. Since no final judgment has been entered against the Company in the Trustees' suit, a separate action would not be ripe for adjudication. The fact that the Company could not have brought its impleader claim before the NLRB goes strongly against *Garmon* preemption.

Other factors militate against the application of *Garmon* preemption as well. First, since the state cause of action prohibits exactly the same conduct that is prohibited by the NLRA—fraud in the collective bargaining process—there is no danger that state regulation will interfere with conduct that Congress intended to protect or create conflicting rules of substantive law in the labor relations area. *See Jones v. Truck Drivers Local Union No. 299*, 838 F.2d 856, 872 (6th Cir. 1988). Second, a cause of action in impleader in federal district court is different in character from a proceeding before the NLRB. Some of the parties to the action at bar are different. Although many of the issues to be presented in the

impleader claim are similar to issues that could have been brought before the NLRB, the case as a whole will present many issues that could not have been brought in an unfair labor practice claim that could have been pursued before the NLRB. Different remedies are available. Since identity of parties, issues and remedies is lacking, the District Court's adjudication of the state cause of action does not threaten the federal regulatory scheme because the District Court does not purport to act as a surrogate labor board. *See id.* at 873. Third, this case is being adjudicated by a federal, rather than a state court; federal courts have experience and expertise in construing federal labor law. Where the District Court is initially merely deciding what it would otherwise have authority to review at a later stage in the judicial process, it is "safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Griffith Constr.*, 785 F.2d at 710-11. Finally, the interest in efficient adjudication of disputes and in avoiding inconsistent judgments favors having all matters related to the instant dispute disposed of before the same tribunal, and as part of the same action.

In light of the foregoing factors, the Court finds that *Garmon* preemption is not warranted in this case.[2]

D. Service of Process

Third-party Defendants also claim, albeit without any argument in support thereof, that the Company failed to perfect service of process on them. The Court has reviewed

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[2] Third-party Defendants have cited the Court to *Hanley v. Lobster Box Restaurant, Inc.*, 35 F. Supp. 2d 366 (S.D.N.Y.1999), which held *Garmon* preemption applicable on facts similar to those presented in this case. That decision is not binding on this Court, since it arose in a different jurisdiction. The *Hanley* Court did not discuss the *Sears* rule, and in fact appears to have been unaware of the Supreme Court's opinion in that case. With all due respect to the court that decided *Hanley*, this Court disagrees with its reasoning and result, for the reasons given above.

the record. Two Summonses and a Complaint, along with a facially valid certificate of process, have been filed with the Court. Third-Party Defendants have made no showing that would give rise to a finding that service of process was not perfected in accordance with the Federal Rules of Civil Procedure. The Court will address Third-Party Defendants' motion to dismiss on the merits.

E. Helldobler's Claims of Statutory Immunity

Third-Party Defendant Val Helldobler has moved to dismiss all of the Company's claims against him on the ground of statutory immunity. He correctly points out that § 301(b) of the LMRA permits recovery only against labor organizations as entities, and expressly provides that no money judgment in an LMRA action shall be enforceable against any individual union member or his assets. 29 U.S.C. § 185(b).

The problem with Helldobler's arguments is that the Company has not sued him under the LMRA. The Company, as discussed above, has brought only state law claims for indemnity, contribution, and fraudulent or negligent misrepresentation. When a state law claim brought against a union officer does not implicate a CBA, the immunity provided by § 301(b) is inapplicable. *Felice v. Sever*, 985 F.2d 1221, 1231 (3d Cir.1993). Helldobler is not immune from the Company's claims.

F. Failure to Exhaust Arbitration Provision of CBA

Third-Party Defendants have argued that the Company's claims are subject to dismissal for failure to exhaust the mandatory arbitration provision of the CBA. The CBA provides for the mandatory arbitration of all "disputes, claims or grievances regarding the interpretation or application of the existing labor agreement." (CBA, art. XXIX.)

It is highly doubtful whether the mandatory arbitration provision applies at all in this case, since the dispute at issue is over the interpretation of the Project Agreements, rather than the CBA. Even if the Court were to assume that the mandatory arbitration provision might otherwise be applicable, however, it does not require administrative exhaustion in this case. Administrative exhaustion is not required where the aggrieved party initially appeared in the case in a defensive posture. *See South Central United Food & Commercial Workers Unions v. C&G Markets, Inc.*, 836 F.2d 221, 225 (5th Cir.1988); *Central States Pension Fund v. Howard Baer, Inc.*, 753 F. Supp. 241, 245 (N.D. Ind. 1991). The Company was not required to take its claims to mandatory arbitration.

G. Statute of limitations

Finally, Third-Party Defendants argue that the Company's claims must be dismissed because they are untimely under the six-month statute of limitations applicable to § 301 actions. Again, the problem with Third-Party Defendants' argument is that the impleader action does not arise under § 301. Fraud claims have a four-year statute of limitations under Ohio law. OHIO REV. CODE § 2305,09(C). No argument has been made that the Company's claims arose more than four years ago. The impleader action is not subject to dismissal on statute of limitations grounds.

CONCLUSION

For the foregoing reasons, Third-Party Defendants International Association of Bridge, Structural Ornamental & Reinforcing Iron Workers Local No. 55 and Val Helldobler's motion to dismiss is denied.

IT IS SO ORDERED.

/s/ David A. Katz
DAVID A. KATZ
U.S. DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Jul 9, 1999]

Case No. 3:98 CV 7443

NORTHWESTERN OHIO ADMINISTRATORS, INC.,
Plaintiff,

-vs-

WALCHER & FOX, INC.,
Defendant.

MEMORANDUM OPINION

KATZ, J.

This matter is before the Court on Plaintiff's motion for partial summary judgment and on Defendant's separate motions for leave to file an amended answer adding a counterclaim, and to file a third-party complaint and jury demand. For the following reasons, Plaintiff's motion for partial summary judgment will be denied. Defendant's motion for leave to file an amended answer adding a counterclaim will be granted. Defendant's motion to file a third-party complaint and jury demand will be granted.

Defendant has not filed a motion for summary judgment, but has argued in its opposition to Plaintiff's motion for summary judgment that it (Defendant) is entitled to summary judgment. The Court will decline that invitation.

BACKGROUND

Plaintiff Northwestern Ohio Administrators, Inc. ("NOA") "is a not-for-profit corporation that is charged with collecting

employer contributions to various jointly-administered multi-employer employee benefit plans under the Employee Retirement Income Security Act ("ERISA") and the Labor-Management Relations Act ("LMRA").

Between September 18, 1996 and May 20, 1997, Defendant Walcher & Fox, Inc. ("the Company") and the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local No. 55 (the Union") entered into five separate Project Agreements obliging the Company to make fringe benefit and pension fund contributions to nine separate employee benefit plans, for each of which NOA is the administrator. The Project Agreements incorporated the terms and conditions of the collective bargaining agreement ("CBA") entered into between the Labor Relations Division of the Associated General Contractors of Northwest Ohio and the Union.

They provide in relevant part that:

> 1. The Company hereby recognizes the Union as the representative of a majority of its employees designated, acknowledges receipt of a copy of the current Bargaining Agreement and agrees to be bound by the terms and conditions contained therein. . . . [and]
>
> * * *
>
> 4. The Company agrees to make the contributions and deductions to the said Plans at the times and in the amounts specified in the Bargaining Agreement, for all of its employees performing the work specified in the Bargaining Agreement.

The CBA, which was incorporated by reference into each Project Agreement, requires the Company to:

> make payments of fringe contributions and deductions to each and every employee benefit plan for all employees of each such Participating Employer who are members

> of the collective bargaining unit represented by the Union (*whether or not the employees are members of the Union*).

(CBA, Art. XXVI (B) ¶148 (emphasis added).) The Project Agreements also contain standard merger clauses, each providing that the written contract "constitutes the entire understanding and agreement on the matters covered herein and shall not be modified or amended except by the express written consent of the parties."

Thus, the plain language of the printed portions of the Project Agreements, read in isolation, requires the Company to remit the required contributions for each employee on the covered projects, regardless of whether the employee is a Union member.

The negotiation history of the Project Agreements, along with some handwritten notations on two of the Project Agreements, indicates that the parties may have intended the Project Agreements to cover only employees who were current Union members. The first Project Agreement, for a project known as the Arkam Steel project, was signed on September 18, 1996, after negotiations between Union business agent Val Helldobler and Company co-owners James Walcher and Jeffrey Fox. Walcher and Fox have each testified that the parties orally agreed that the Company's fringe benefit contribution obligation applied only to employees who were also Union members, and that such agreement was memorialized on the first contract by means of a handwritten notation that reads "2-men Arkam steel job only." Helldobler denies that any such oral agreement was made, and says that the notation indicates only that the Union would provide two men for the Arkam Steel project.

The remaining four Project Agreements were entered on similar terms. The second Project Agreement contains a handwritten notation that reads "1 Journeyman & 1

Apprentice 8th man weekly benefit pay." The other three Project Agreements do not contain any such notations.

On October 13, 1997, NOA formally requested the Company to submit to a payroll audit for all of its employees performing work on all the projects covered in the Project Agreements. The Company refused, taking the position that it was required to submit to the audit only for its employees who were also members of the Union.

On August 3, 1998, NOA filed the instant lawsuit, claiming that the Company's refusal to submit to the payroll audit and to remit benefits contributions for all employees, rather than for Union employees only, constitutes a breach of the Project Agreements. It brought this action under § 301 of the LMRA, 29 U.S.C. § 185, and ERISA, 29 U.S.C. § 1132(e), seeking monetary and injunctive relief, liquidated damages, payment for an audit, and costs and attorney fees.

At a Case Management Conference conducted on November 18, 1998, the parties agreed to bifurcate discovery in this case between the issues of (1) the scope of the Project Agreements, and (2) the amount of liability, if any. Discovery concluded in the first phase of the case on April 9, 1999.

On April 30, 1999, NOA filed a motion for partial summary judgment on the scope of the Project Agreements, seeking judgment as a matter of law that the scope of the five Project Agreements includes all employees performing work covered by the Project Agreements. The Company has filed opposition to that motion, and has asked for judgment as a matter of law that the scope of the five Project Agreements includes only Union members performing work covered by the Project Agreements. NOA has filed a reply to the Company's brief.

On April 28, 1999, the Company filed two separate motions seeking to add (1) a counterclaim against NOA for reimbursement of excess fringe benefits and pension fund

contributions it alleges it made to NOA, and (2) a third-party claim against the Union and/or Union business agent Val Helldobler for indemnity and/or contribution in the event the Company is found liable to NOA. NOA has filed opposition to both motions, and the Company has replied thereto.

The Court discusses the parties' contentions below.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A. *Summary Judgment Standard*

The first issue before the Court is whether NOA it entitled to summary judgment on its claim that the scope of the five Project Agreements includes all employees performing covered work, rather than only Union members performing covered work.

As an initial matter, the Court sets forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 191 L. Ed. 2d 265 (1986). Of course, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323, 106 S. Ct. at 2553. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2541, 91 L. Ed. 2d 202 (1986) (*quoting* Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or

merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

B. *Application to the Case at Bar*

The issue presently before the Court is whether the scope of coverage of a contract can be determined as a matter of law, when the contract incorporates in one place a separate CBA provision stating that it applies to "all employees of each such Participating Employer who are members of the collective bargaining unit represented by the Union (whether or not the employees are members of the Union)," but contains in another place a notation which can be construed to indicate that the parties intended the contract to cover only employees who were current Union members.

NOA argues that it is entitled to summary judgment on the scope of coverage because the printed portion of the contract unambiguously makes the contract applicable to all employees on covered projects, whether or not they are members of the Union. NOA argues further that the merger clause in the contract precludes any modification to the terms of the contract unless such modifications are made in writing.

The problem with NOA's argument is that additional written notations, which notations appear directly on the face

of the contract, can be construed as limiting the coverage of the agreement to Union members only. Each side has offered a competing construction of the cryptic notation "2-men Arkam steel job only" on the face of one of the contracts. The Company's representatives have testified that the notation memorializes an agreement that the Company's benefit contribution obligation applied only to employees who were also Union members. The Union's representative has testified that the notation indicates that the Union would provide two men for the Arkam Steel project.

The "2-men Arkam steel job only" notation appears on the face of the contract, and both sides seem to agree that the parties intended it to be part of the contract. The notation is ambiguous. Both sides have offered colorable interpretations of the notation, and those interpretations would lead to different outcomes with regard to the scope of coverage issue. The ambiguity can be resolved only by means of extrinsic evidence, and that evidence is in conflict. Therefore, the scope of coverage issue cannot be resolved on a motion for summary judgment.

Plaintiff's motion for partial summary judgment is, therefore, denied. The Court declines Defendant's invitation to enter partial summary judgment in its favor.

DEFENDANT'S MOTION TO ADD COUNTERCLAIM

The Defendant Company has moved for leave to add a counterclaim against NOA to recover excess fringe benefits and pension fund contributions it alleges it made to NOA. The Company says that it did not learn of the overpayments until discovery had been undertaken in this case.

NOA has opposed the Company's motion on the sole ground of timeliness. It argues that the Company unreasonably delayed its motion until after discovery closed and dispositive motions were due on the issue of coverage, and

that such delay will require reopening discovery, will impose extra costs on NOA, and will postpone the ultimate resolution of this matter.

The Federal Rules of Civil Procedure permit a party who has omitted a counterclaim through "oversight, inadvertence, or excusable neglect" to raise the counterclaim by amendment by leave of court. Fed. R. Civ. P. 13(f). Leave to amend is freely given when justice so requires. In determining whether to grant leave to amend, courts consider such factors as whether the counterclaim is compulsory, "whether the non-moving party will be prejudiced, whether additional discovery will be required, and whether the court's docket will be strained." *Budd Co. v. Travelers Indem. Co.*, 820 F.2d 8787, 792 (6th Cir.1987) (citations omitted). Delay in bringing the motion to add a counterclaim cannot be the sole reason for the denial of a Rule 13(f) motion, especially where no prejudice to the non-moving party has been shown. *See Tefft v. Seward*, 689 F.2d 637 (6th Cir. 1982) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In this case, the fact that the counterclaim is compulsory—that is, it arises out of the same transaction or occurrence that is the subject of NOA's claim, *see* Fed. R. Civ. P. 13(a)—militates strongly in favor of allowing the amended pleading. NOA has made no showing that it will suffer actual prejudice if amendment is allowed, since the discovery the parties have conducted to date concerns the scope of the Project Agreement, and the counterclaim concerns the measurement of damages. The additional discovery that will be required should not pose an unreasonable burden, since much of the discovery that will be required on the counterclaim is discovery in which the parties will have to engage in order to determine the amount of damages in the original claim. The Court sees no way in which its docket will be strained by allowing the additional claim. NOA has made no showing that the Company delayed bringing its counterclaim in bad

faith or with a dilatory motive. On these facts, the Court finds that justice demands permitting the Company to bring its counterclaim.

Accordingly, the Company's motion to add a counterclaim against NOA is granted.

DEFENDANT'S MOTION TO ADD THIRD-PARTY COMPLAINT

The Defendant Company has also moved for leave to bring a third-party complaint against the Union and its representative, Val Helldobler, for indemnity and/or contribution in the event it is found liable to NOA. The Company says that it entered into the Project Agreements on the basis of Helldobler's oral representations that the Company would be responsible to make fringe benefit and pension fund contributions only for employees who were Union members. It seeks to bring claims of fraud and negligent misrepresentation against the Union and Helldobler.

NOA has filed opposition to that motion. It argues: (1) that permitting the third-party complaint will unreasonably complicate the issues in this case; (2) the third-party complaint is meritless; and (3) the Company unreasonably delayed bringing its third-party complaint.

The Federal Rules of Civil Procedure permit a defendant to implead any person who "is or may be liable to the [defendant] for all or part of the plaintiff's claim against the [defendant]." Fed. R. Civ. P. 14(a). The decision to permit a third-party complaint is within the sound discretion of the trial court, and impleader should generally be allowed on any colorable claim of derivative liability that will not unduly delay or otherwise prejudice the ongoing proceedings. *Lehman v. Revolution Portfolio, L.L.C.*, 166 F.3d 389, 393 (1st Cir.1999). In determining whether to grant a party's motion to implead a third-party defendant, courts consider such factors as whether the party has unreasonably delayed

bringing its motion to implead, whether allowing impleader is likely to delay the trial, the potential for complication of issues at trial, and whether the original plaintiff will be prejudiced. *Ronson v. Talesnick*, 33 F. Supp. 2d 347, 356 (D.N.J.1999).

In this case, the Court finds that justice demands permitting the Company to bring its impleader action. For the reasons given above in the discussion of the Company's motion to file a counterclaim, the Company's motion is not untimely, it is unlikely that trial will be delayed, and NOA has not shown that it will be prejudiced. The Court disagrees with NOA's contention that permitting the Company to implead the Union and Helldobler will unreasonably complicate the issues. It appears at this juncture that many of the arguments and evidence that the Company will use in its claims against the Union and Helldobler will be the same arguments and evidence that the Company will use in its own defense against liability to NOA. Whatever marginal increase in complexity that impleading the Union and Helldobler might add will be more than compensated by the increase in efficiency that trying the issues in one case, rather than two, will provide. The Court also disagrees with NOA's contention that the Company's motion should be denied because its claims against the Union and Helldobler are meritless. The Company has raised a facially viable claim of fraud in the execution and fraud in the inducement. While the Company's position may not ultimately prevail, it would be premature for this Court to deny the Company's impleader motion on that ground at this juncture, when the issue has been subject neither to discovery nor to complete briefing.

Accordingly, the Company's motion to implead the Union and Helldobler is granted.

CONCLUSION

For the foregoing reasons, Plaintiff Northwestern Ohio Administrators, Inc.'s motion for partial summary judgment

(Doc. No. 35) is denied. Defendant Walcher & Fox, Inc.'s motion for leave to file an amended answer adding a counterclaim (Doc. No. 32) is granted. Defendant's motion to file a third-party complaint against the International Ornamental and Reinforcing Iron Workers, Local No. 55 and Val Helldobler (Doc. No. 33) is granted.

IT IS SO ORDERED.

/s/ David A. Katz
DAVID A. KATZ
U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3.98 CV 7443
JUDGE KATZ

NORTHWESTERN OHIO ADMINISTRATORS, INC.
1600 Madison Avenue, P.O. Box 697
Toledo, Ohio 43697-0697,
Plaintiff,

v.

WALCHER & FOX, INC.,
1967 Co. Rd. 308
Bellevue, Ohio 44811,
Defendant/Third-Party Plaintiff,

v.

INTERNATIONAL ASSOCIATION OF BRIDGE STRUCTURAL,
ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL
UNION NO. 55
1080 Atlantic
Toledo, Ohio 43609,

and

VAL J. HELLDOBLER
c/o International Association of Bridge, Structural,
Ornamental and Reinforcing Iron Workers,
Local Union No. 55
1080 Atlantic
Toledo, Ohio 43609,
Third-Party Defendants.

THIRD-PARTY COMPLAINT AND JURY DEMAND

NOW COMES Defendant/Third-Party Plaintiff Walcher & Fox, Inc. ("Walcher & Fox") and for its Third-Party Complaint states as follows:

1. In the event that the Court holds that Walcher & Fox was obligated to make fringe benefit and pension fund contributions for all individuals employed on the five projects covered by the five project-only agreements it entered into, and not just for the one or two union members respectively employed on each project, and Walcher & Fox is therefore held liable for any damages, interest, penalties, contributions or others relief to Plaintiff Northwestern Ohio Administrators, Inc. ("Plaintiff" or "NOA") as a result of Plaintiff's Complaint, this is an action for declaratory judgment, indemnification contribution, fraud and negligent misrepresentation brought to recover any and all sums found to be due and owing by Walcher & Fox to Plaintiff and other appropriate damages, and arises under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 and state law.

2. This Court has jurisdiction over this matter pursuant to 29 U.S.C. § 185(c) and pendent jurisdiction.

3. The International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union No. 55 ("Local 55") is a "labor organization" as defined in 29 U.S.C. § 152(5). Walcher & Fox is an "employer" engaged in an industry "affecting commerce" as defined in 29 U.S.C. §§ 152(2) and (7).

4. On August 3, 1998, Plaintiff NOA filed a Complaint in which it is alleged that Walcher & Fox failed to make all required fringe benefit and pension fund contributions required under a collective bargaining agreement between the

Labor Relations Division of the Associated General Contractors of Northwest Ohio and Local 55: Any and all obligations Walcher & Fox has to NOA under the collective bargaining agreement result from five project-only agreements it entered into with Local 55 between September 18, 1996 and May 20, 1997.

5. By means of fraud in the execution, Local 55 by and through its business agent, Val J. Helldobler, defrauded Walcher & Fox into entering a project-only agreement on September 18, 1996. During approximately two or three discussions between September 14, 1996 and September 18, 1996, Helldobler misrepresented the scope and nature of the agreement, stating the instrument only applied to and contributions would only be owed for the two union members Local 55 would provide to work on the Arkam Steel project in Temperance, Michigan. In reliance on Helldobler's material misrepresentations concerning the scope of the agreement, Walcher & Fox signed the agreement after being led to believe the nature of the instrument was something entirely different than it actually was. As a result, Walcher & Fox entered into the agreement without knowledge of the character of the instrument or its essential terms and acted with excusable ignorance of the contents of the agreement. The agreement is one of the bases for Plaintiffs Complaint against Walcher & Fox.

6. By means of fraud in the execution, Local 55 by and through its business agent, Val J. Helldobler, defrauded Walcher & Fox into entering a project-only agreement on December 13, 1996. In the course of weekly discussions from October 26, 1996 through December 13, 1996, Helldobler misrepresented the scope and nature of the agreement, stating the instrument only applied to and contributions would only be owed for the one union member that Local 55 would provide to work on the Victory Industrial Properties project in Temperance, Michigan. In reliance on Helldobler's material

misrepresentations concerning the scope of the agreement, Walcher & Fox signed the agreement after being led to believe the nature of the instrument was something entirely different than it actually was. As a result, Walcher & Fox entered into the agreement without knowledge of the character of the instrument or its essential terms and acted with excusable ignorance of the contents of the agreement. The agreement is one of the bases for Plaintiff's Complaint against Walcher & Fox.

7. By means of fraud in the execution, Local 55 by and through its business agent, Val J. Helldobler, defrauded Walcher & Fox into entering a project-only agreement on April 2, 1997. During at least one telephone discussion that occurred between March 15, 1997 and April 2, 1997, Helldobler misrepresented the scope and nature of the agreement, stating the instrument only applied to and contributions would only be owed for the one union member that Local 55 would provide to work on the Midwest Tool & Die project in Toledo, Ohio. In reliance on Helldobler's material misrepresentations concerning the scope of the agreement, Walcher & Fox signed the agreement after being led to believe the nature of the instrument was something entirely different than it actually was. As a result, Walcher & Fox entered into the agreement without knowledge of the character of the instrument or its essential terms and acted with excusable ignorance of the contents of the agreement. The agreement is one of the bases for Plaintiff's Complaint against Walcher & Fox.

8. By means of fraud in the execution, Local 55 by and through its business agent, Val J. Helldobler, defrauded Walcher & Fox into entering a project-only agreement on April 14, 1997. During at least one discussion between March 28, 1997 and April 14, 1997, Helldobler misrepresented the scope and nature of the agreement, stating the instrument only applied to and contributions would only be

owed for the one union member that Local 55 would provide to work on the Monroe Mold & Machine project in Monroe, Michigan. In reliance on Helldobler's material misrepresentations concerning the scope of the agreement, Walcher & Fox signed the agreement after being led to believe the nature of the instrument was something entirely different than it actually was. As a result, Walcher & Fox entered into the agreement without knowledge of the character of the instrument or its essential terms and acted with excusable ignorance of the contents of the agreement. The agreement is one of the bases for Plaintiffs Complaint against Walcher & Fox.

9. By means of fraud in the execution, Local 55 by and through its business agent, Val J. Helldobler, defrauded Walcher & Fox into entering a project-only agreement on May 20, 1997. During weekly discussions between March 29, 1997 and June 20, 1997, Helldobler misrepresented the scope and nature of the agreement, stating the instrument only applied to and contributions would only be owed for the two union members that Local 55 would provide to work on the Unique Tool & Die project in Temperance, Michigan. In reliance on Helldobler's material misrepresentations concerning the scope of the agreement, Walcher & Fox signed the agreement after being led to believe the nature of the instrument was something entirely different than it actually was. As a result, Walcher & Fox entered into the agreement without knowledge of the character of the instrument or its essential terms and acted with excusable ignorance of the contents of the agreement of the bases for Plaintiffs Complaint against Walcher & Fox.

10. By means of fraud in the inducement, Local 55 by and through its business agent, Helldobler, defrauded Walcher & Fox into entering a project-only agreement on September 18, 1996. During approximately two or three discussions between September 14, 1996 and September 18, 1996, Helldobler

misrepresented the scope of the agreement, stating the instrument only applied to and contributions would only be owed for the two union members that Local 55 would provide to work on the Arkam Steel Project in Temperance, Michigan when, according to Plaintiff's Complaint against Walcher & Fox, the agreement applies to every individual employed by Walcher & Fox who worked on that project. In reliance on Helldobler's material misrepresentations concerning the scope of agreement, Walcher & Fox was induced to consent to an agreement it otherwise would not have. The agreement is one agreement is one of the bases for the Plaintiff's Complaint against Walcher & Fox.

11. By means of fraud in the inducement, Local 55 by and through its business agent, Helldobler, defrauded Walcher & Fox into entering a project-only agreement on December 13, 1996. During weekly discussions between October 26, 1996 and December 13, 1996, Helldobler misrepresented the scope of the agreement, stating the instrument only applied to and contributions would only be owed for the one union member that Local 55 would provide to work on the Victory Industrial Properties project in Temperance, Michigan when according to Plaintiffs Complaint against Walcher & Fox, the agreement applies to every individual employed by Walcher & Fox who worked on that project. In reliance on Helldobler's material misrepresentations concerning the scope of the agreement, Walcher & Fox was induced to consent to an agreement it otherwise would not have. The agreement is one of the bases for the Plaintiffs Complaint against Walcher & Fox.

12. By means of fraud in the inducement, Local 55 by and through its business agent, Helldobler, defrauded Walcher & Fox into entering a project-only agreement on April 2, 1997. During at least one telephone conversation between March 15, 1997 and April 2, 1997, Helldobler misrepresented the scope of the agreement, stating the instrument only applied to and contributions would only be owed for the one union

member that Local 55 would provide to work on the Midwest Tool & Die project in Toledo, Ohio when, according to Plaintiff's Complaint against Walcher & Fox, the agreement applies to every individual employed by Walcher & Fox who worked on that project. In reliance on Helldobler's material misrepresentations concerning the scope of the agreement, Walcher & Fox was induced to consent to an agreement it otherwise would not have. The agreement is one of the bases for the Plaintiff s Complaint against Walcher & Fox.

13. By means of fraud in the inducement, Local 55 by and through its business agent, Helldobler, defrauded Walcher & Fox into entering a project-only agreement on April 14, 1997. During at least one discussion between March 28, 1997 and April 14, 1997, Helldobler misrepresented the scope of the agreement, stating the instrument only applied to and contributions would only be owed for the one union member that Local 55 would provide to work on the Monroe Mold & Machine project in Monroe, Michigan when, according to Plaintiff's Complaint against Walcher & Fox, the agreement applies to every individual employed by Walcher & Fox who worked on that project. In reliance on Helldobler's material misrepresentations concerning the scope of the agreement, Walcher & Fox was induced to consent to an agreement it otherwise would not have. The agreement is one of the bases for the Plaintiff's Complaint against Walcher & Fox.

14. By means of fraud in the inducement, Local 55 by and through its business agent, Helldobler, defrauded Walcher & Fox into entering a project-only agreement on May 20, 1997. During weekly discussions between March 29, 1997 and June 20, 1997, Helldobler misrepresented the scope of the agreement, stating the instrument only applied to and contributions would only be owed for the two union members that Local 55 would provide to work on the Unique Tool & Die project in Temperance, Michigan when, according to Plaintiffs Complaint against Walcher & Fox, the agreement applies to every individual employed by Walcher & Fox who

worked on that project. In reliance on Helldobler's material misrepresentations concerning the scope of the agreement, Walcher & Fox was induced to consent to an agreement it otherwise would not have. The agreement is one of the bases for the Plaintiffs Complaint against Walcher & Fox.

COUNT I: DECLARATORY JUDGMENT

15. Walcher & Fox incorporates by reference Paragraphs 1 through 14, as if fully set forth herein.

16. Because of Local 55's and Helldobler's fraud in the execution of the five project-only agreements, each of the agreements was void *ab initio*.

17. In the alternative, because Local 55 and Helldobler obtained Walcher & Fox's execution of the five project-only agreements by means of fraud in the inducement, each of the agreements is voidable by Walcher & Fox.

18. Should the Court determine that Walcher & Fox was obligated to make fringe benefit, pension fund or other contributions for all individuals employed on the five projects covered by the project-only agreements, and not just the one or two union members employed on each respective project, and Walcher & Fox is therefore liable to Plaintiff for additional contributions, penalties, interest or other damages or relief as a result of Plaintiffs claims against Walcher & Fox in Plaintiffs Complaint, the Court should hold Local 55 and Helldobler liable to Walcher & Fox in like amount for all contributions, interest, penalties or other damages or relief because the five project-only agreements were obtained by fraud.

19. It has been necessary for Walcher & Fox to retain the services of attorneys to prosecute this action and defend itself against Plaintiffs Complaint and Walcher & Fox is entitled to an award of attorneys' fees and costs.

COUNT II: INDEMNIFICATION/CONTRIBUTION

20. Walcher & Fox incorporates by reference Paragraphs 1 through 19, as if fully set forth herein.

21. Should Walcher & Fox be held liable to the Plaintiff in any amount as a result of Plaintiffs Complaint against Walcher & Fox, Local 55 and Helldobler shall indemnify and/or contribute to Walcher & Fox all the amounts, contributions, interest, penalties or other damages or relief due and owing by Walcher & Fox to Plaintiff.

22. It has been necessary for Walcher & Fox to retain the services of attorneys to prosecute this action and defend itself against Plaintiff's Complaint and Walcher & Fox is entitled to an award of attorneys' fees and costs.

COUNT III: FRAUDULENT MISREPRESENTATION

23. Walcher & Fox incorporates by reference Paragraphs 1 through 22, as if fully set forth herein.

24. Third-Party Defendant Helldobler, individually, or acting as an authorized agent of Local 55, is liable for fraudulent and intentional misrepresentations in that he: (i) made false statements of material fact concerning the scope of coverage and nature of the project-only agreements; (ii) knew that the statements were false: (iii) made the statements with the intent to cause Walcher & Fox to execute instruments radically different from what Helldobler led Walcher & Fox to believe it was signing; (iv) caused Walcher & Fox to justifiably and reasonably rely on the mate rial misrepresentations; and (v) caused Walcher & Fox financial damages.

25. As a direct and proximate result of the fraud set forth herein, Walcher & Fox has been damaged in like amount to any contributions, damages or other relief Walcher & Fox is held liable to Plaintiff as a result of Plaintiff's Compliant.

26. It has been necessary for Walcher & Fox to retain the services of attorneys to prosecute this Third-Party Complaint

and defend itself against Plaintiffs Complaint and Walcher & Fox is entitled to an award of attorneys' fees and costs.

COUNT IV: NEGLIGENT MISREPRESENTATION

27. Walcher & Fox incorporates Paragraphs 1 through 26, as if fully set forth herein.

28. Third-Party Defendant Helldobler, individually, or acting as an authorized agent of Local 55, is liable for negligent misrepresentations, in that he: (i) acting in the course of his employment and/or a transaction in which he had pecuniary interest; (ii) supplied false information to Walcher & Fox; (iii) to guide Walcher & Fox in the course of its business; (iv) without exercising reasonable care in obtaining and/or communicating the information; (v) and Walcher & Fox justifiably relied upon the information to its detriment.

29. As a direct and proximate result of the negligent misrepresentations set forth herein, Walcher & Fox has been damaged in like amount to any contributions, damages or other relief Walcher & Fox is held liable to Plaintiff as a result of Plaintiffs Compliant.

30. It has been necessary for Walcher & Fox to retain the services of attorneys to prosecute this Third-Party Complaint and defend itself against Plaintiff's Complaint and Walcher & Fox is entitled to an award of attorneys' fees and costs.

WHEREFORE, Third-Party Plaintiff Walcher & Fox requests this Court to declare the project-only agreements void *ab initio*, or, voidable by Walcher & Fox. Walcher & Fox further requests that, in the event Walcher & Fox is found liable to Plaintiff NOA in any amount, that judgment be entered in favor of Walcher & Fox and against Local 55 and Helldobler on Walcher & Fox's Third-Party Complaint and that Local 55 and Helldobler be found liable to Walcher & Fox for compensatory damages in like amount, punitive damages in the amount of One Million Dollars ($1,000,000), attorneys' fees, costs and other relief found to be just and appropriate.

Respectfully submitted,

/s/ Alan G. Ross
ALAN G. ROSS (Ohio Bar Reg. No. 0011478)
Fred Seleman (Ohio Bar Reg. No. 0067832)
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(216) 447-1551

COUNSEL FOR DEFENDANT/THIRD-PARTY PLAINTIFF
Walcher & Fox, Inc.

JURY DEMAND

Third-Party Plaintiff Walcher & Fox, Inc. demands a trial by jury pursuant to the Federal Rules of Civil Procedure.

/s/ Alan G. Ross
ALAN G. ROSS
COUNSEL FOR DEFENDANT/THIRD-PARTY PLAINTIFF
Walcher & Fox, Inc.

PROOF OF SERVICE

A copy of the Third-Party Complaint and Jury Demand has been forwarded by regular U.S. Mail, postage prepaid, to:

Joseph M. D'Angelo, Esq.
Gallon & Takacs Co., L.P.A.
3516 Granite Circle
Toledo, Ohio 43617-1172

Counsel for Plaintiff

This 28th day of July, 1999.

/s/ Alan G. Ross
ALAN G. ROSS
COUNSEL FOR DEFENDANT/THIRD-PARTY PLAINTIFF